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IN THE

Supreme Court of the United States

OCTOBER TERM, 1949

No. 202

DAIRYMEN'S LEAGUE CO-OPERATIVE ASSOCIATION, INC.,
Petitioner,

v.

CHARLES F. BRANNAN, as Secretary of Agriculture of the United States,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT, AND BRIEF IN SUPPORT THEREOF

SEWARD A. MILLER,
Attorney for Petitioner,
11 West 42nd Street,
New York, N. Y.

FREDERICK P. LEE,
MYRON SCOTT,
of Counsel.

INDEX

	PAGE
Petition for Writ of Certiorari	1
Summary Statement of Matter Involved	1
Creation of Special Cream Market	2
Official Interpretations of the Order	4
Stipulation of Facts	8
Decisions of the Lower Courts	11
Basis of Court's Jurisdiction	14
Questions Presented	14
Reasons Relied on for Allowance of Writ	16
Brief in Support of Petition	21
Opinions of Lower Courts	21
Specification of Errors	22
Argument	25
POINT I—Decision that formal administrative interpretations may be changed retroactively by informal action of subordinates in Market Administrator's Office is contrary to the decisions of this Court and other Circuits	25
POINT II—The arbitrary action of the Judicial Officer was a denial of a fair hearing to Petitioner and contrary to Applicable Decisions of this Court	28
POINT III—Construction of Order below was Contrary to Applicable Decisions of this Court and other Circuits	31
Conclusion	35

Table of Cases

PAGE

Addison v. Holly Hill Fruit Products, 322 U. S. 607, 617-618 (1944) 32, 33

Anderson v. Mercado, 163 F. 2d 303 33

Arizona Grocers Co. v. A. T. & S. F. R. R., 284 U. S. 370, 389 (1932) 28

Barron Coop. Creamery v. Wickard, 140 F. 2d 485, 488 ..... 27, 31, 32, 34

Bowles v. Seminole Rock & Sand Co., 325 U. S. 410, 413-414 (1945) 28

Brimstone R. & C. Co. v. United States, 276 U. S. 104, 121-123 (1928) 27

Crane v. Comm'r of Int. Rev., 331 U. S. 1, 6 (1947).. 33

Dairymen's League v. Anderson, 173 F. 2d 57 21

Dairymen's League v. Anderson, 5 App. Div. 143 ... 21

F. Uri & Co. v. Bowles, 152 F. 2d 712 25

Green Valley Creamery v. United States, 108 F. 2d 342, 347 27

Interstate Commerce Commission v. Union Pacific, 222 U. S. 541, 547 (1912) 30

Iselin v. United States, 270 U. S. 245, 251 (1926) 32

Lindstrom v. Comm'r of Int. Rev., 149 F. 2d 344, 346 32

Miller v. United States, 294 U. S. 435, 439 (1935) ...28, 32

Morgan v. United States, 294 U. S. 1, 18 (1937) 29, 30

Porter v. Tankar Gas, Inc., 68 F. Supp. 103 25

Schreffler v. Bowles, 153 F. 2d 1, 3 33

PAGE

United States v. American Trucking Ass'n., 310 U. S. 534, 549 (1940) 28

United States v. Carmack, 329 U. S. 230, 247 (1946) .. 29

United States v. McDaniels, 7 Pet. 1, 15 (1833) 28

United States v. Rock Royal, 307 U. S. 533, 549 .... 2, 6

White v. Winchester Country Club, 315 U. S. 32, 41 (1942) 27

STATUTES, ETC.

New York Milk Marketing Order No. 27 (as first promulgated, 7 C. F. R. 1938 Sup. Secs. 927.1-927.11(a)) 2

Art. I, Sec. 1, Par. 3 ..... 2, 33
Art. III, Sec. 2, Par. 1 2
Art. IV, Sec. 1 3
Art. III, Sec. 2, Par. 7 .....3, 4, 32
Art. I, Sec. 1, Par. 6 ..... 5, 33
Art. II, Sec. 3 27
Art. III, Sec. 1 ..... 5, 32

Order No. 27, as amended, 1943 Sup. Sec. 927.1(h) .. 3

4 C. F. R. 1943 Cum. Sup. Sec. 900.58 9

Agricultural Marketing Agreement Act 2

Sec. 8c(15)(A), (7 U. S. C., Sec. 608c(15)(A)).. 8, 30
Sec. 8c(15)(B), (7 U. S. C., Sec. 608c(15)(B)) ..11, 14
Sec. 8c(5)(A)(3), (7 U. S. C., Sec. 608c(5)(A)(3)) 27
Sec. 8c(5)(B), (7 U. S. C., Sec. 608c(B)) 27
Sec. 8c(16)(C), (7 U. S. C., Sec. 608c(16)(C)) .. 27
Sec. 8c(17), (7 U. S. C., Sec. 608c(17)) 27
Sec. 8c(8), (7 U. S. C., Sec. 608c(8)) 27

28 U. S. C. Sec. 1254(1) 14

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

TO THE HONORABLE, THE CHIEF JUSTICE AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

The petition of Dairymen's League Co-operative Association, Inc. for a writ of certiorari, to review a judgment of the Court of Appeals for the Second Circuit, respectfully shows:

Summary Statement of Matter Involved

The petitioner complains of the judgment of the Court of Appeals for the Second Circuit filed February 1, 1949, which affirms a judgment of the United States District Court for the Northern District of New York made after a hearing upon testimony and upon stipulated facts. The

action was one authorized under Section 8c(15) (B) of the Agricultural Marketing Agreement Act of 1937 (7 U. S. C. 608c (15)(B)). The judgment of the District Court denied and dismissed petitioner's complaint which sought a refund of moneys in excess of $145,000 paid under protest to the Market Administrator of the New York Metropolitan Milk Marketing Area. The moneys were demanded of and paid by the petitioner under protest as a result of the action of the Market Administrator in re-classifying certain sales of cream in Northern New Jersey.

Following enactment of the Agricultural and Marketing Agreement Act of 1937 (7 U. S. C. § 601; 50 Stat. 246), the Secretary of Agriculture in May, 1938, held hearings on a proposed regulation (R. 134, 132) and thereafter and on August 5, 1938, issued a regulation known as Order No. 27, effective September 1, 1938 (R. 118), relating to the handling of milk received for sale in the New York Metropolitan Milk Marketing Area (7 C. F. R., 1938, Supp., § 927.1-927.11a, (R. 79-105)).

Creation of Special Cream Market

Order No. 27 provided for a classified pricing system in the sale of milk and was held valid as an effective arrangement for disposition of the normal milk surplus in the New York area, in *United States* v. *Rock Royal,* 307 U. S. 533, 549 (1929).

The order recognized a primary market for the sale of fluid milk in the City of New York and the counties of Nassau, Suffolk and Westchester which it called the New York Metropolitan Milk Marketing Area, to be officially referred to as the "Marketing Area" (Article I, Section 1, paragraph 3 (R. 82); Article III, Section 2, paragraph 1 (R. 86)), which is not in question in this case. It also recognized a special cream market, not expressly so named or identified in the Order No. 27, nor until a later amend-

ment (7 C. F. R., 1943 Supp. § 927.1 (h)). The special cream market in Order No. 27 as first promulgated, effective September 1, 1938, was a market for the sale of surplus in the form of cream of two classes, Class II-A (unpriced), consisting of counties outside the "Marketing Area" (Article IV, Section 1, (R. 88, 11)), and a lower priced class, Class III-D, consisting of counties "outside the State of New York and outside any county in other states in which there is a plant which is approved by any health authority for the receiving of milk to be sold in the "Marketing Area" (Article III, Section 2, paragraph 7 (R. 87, 11)).

The sales in controversy in this case were cream sales reported by the petitioner in Class III-D which the Market Administrator re-classified to II-A (unpriced) (R. 11, 114). For the purposes of this action, the petitioner divided these re-classified sales into four claims (R. 7-10).

Claim 1 relates to shipments of cream from country plants of the League to a purchaser, delivery being made at the railroad platform in Newark, New Jersey, in Essex County, an unapproved county.

Claim 2 relates to shipments of cream from its country plants to the League's plant at Newark, New Jersey, in Essex County, an unapproved county, the sales being made from the plant or on route therefrom.

Claims 3 and 4 relate to cream made at country plants of Borden's of milk received from the League's producers, and from there shipped to the Borden plant at Newark, New Jersey, in Essex County, an unapproved county and later transported for distribution in an approved county; also of milk shipped from country plants of the League and Borden's to the Newark Borden plant, then made into cream and commingled with the cream shipped from the country plants.

During a portion of the time the New Jersey plant of Borden Company was operated by a division of The Borden Company and during the balance of the period by a separate corporation, a subsidiary of The Borden Company.

Also during the months of March and April, 1940, shipments of cream were made from the Borden Oxford country plant to another plant where it was pasteurized and packaged and transported for distribution to the distribution depots of The Borden Company in Montclair and Newark both in unapproved counties.

In general, petitioner claimed III-D status for this milk because it was actually sold or delivered in an unapproved county in New Jersey. The Market Administrator claimed II-A (unpriced) status for these sales because the cream sold was later removed to an approved county in New Jersey or passed through an approved county in reaching destination in an unapproved county.

The Official Interpretations of the Order

Questions arose as to the operations of these provisions of Order No. 27 classifying cream for sale almost immediately after its issuance. Particularly in question were the provisions of Article III, Section 2, paragraph 7, which stated that III-D cream was cream delivered to a purchaser not a handler outside of New York and outside an approved county. These questions arising as to the interpretation and administrative application to be given to the words, "not a handler," were as follows: (a) when the operator of a plant is or is not a handler; (b) whether shipment of cream from a country plant to a plant in an unapproved county would automatically take a III-D classification.

The order applied only to handlers (preamble 3 (R. 81)) and handlers were defined as persons engaged in the han-

dling of milk at approved plants (Article I, Section 1, paragraph 6 (R. 83)). The phrase "not a handler" was not expressly defined in the Act or in Order No. 27, but was impliedly defined in the definition of "Handler" in Article I, Section 1, paragraph 6, last sentence, reading, "This definition shall not be deemed to include any person who neither receives milk from producers nor handles milk which is sold as milk or cream in the marketing area." The plants in the unapproved counties involved in this case neither received milk from producers nor sold milk in the marketing area. The word "delivered" was not expressly defined in the Act.

A further question arose at the same time as to the administrative application of the provision found in Article III, Section 1 (R. 85, 86) stating that milk shall be classified in accordance with its utilization at or movement from the plant where received from producers provided that if the milk is moved as cream from any plant outside of the "Marketing Area" to any second plant, classification may be in accordance with its utilization at such second plant. The principal question here arising as to the meaning and application of the word "utilization" was: (c) could a second plant for classification purposes be a second cream plant, or did utilization mean a change in form such that if the milk were changed into cream at the first plant, it could not be utilized again by sale as cream at the second plant?

A conference as to the interpretation or application of the provision of the order was had on November 26, 1938, between the Market Administrator and his aides and representatives of the industry. A statement of points involved was submitted by the Administrator to representatives of the Division of Milk Control of the Department of Agriculture and Markets of the State of New York, and to representatives of the Dairy Division of the Department of Agriculture at Washington, D. C., for the very purpose

of determining the administrative interpretation or application of the III-D classification (R. 53, 59, 129).

As a result of these official conferences, there was issued and publicly announced to the industry, including petitioner at a meeting at Syracuse, New York, on December 5, 1938, a statement as to several rulings of the Administrator as to the administrative application of the order particularly relating to the cream classification provisions discussed at the conference (R. 53-56, 59, 77). The record shows that a further statement and public announcement was made by the Administrator on the same date or shortly thereafter and in December, 1938, to the representatives of the industry containing answers to the question of the industry as to applications of the provisions of the order which were put to the Administrator by the industry on December 5, 1938 (R. 130, 131).

These statements of the Market Administrator, in general and as to the questions referred to above arising under Article III, Section 2, paragraph 7, were: (a) that a handler receiving cream at an unapproved plant is not a handler with respect to that plant (R. 131); and (b) that cream shipped to an unapproved county automatically took a III-D classification (R. 55). As to the question referred to above arising under Article III, Section 1, the statement of the Market Administrator was; (c) that classification may be in accordance with the second cream plant which may be the third plant (R. 53, 77).

These interpretations were not only proper but necessary for the purpose of indicating to the industry how the order would be applied in case of certain movements and uses as to which the words of the order were not entirely specific. Such interpretations were not contrary to the provisions of the order.

The order was suspended January 31, 1939 to July 1, 1939, pending the test of its validity in the *Rock Royal*

case *supra,* and no question arises as to the construction and application of the order during that time, except that it extended by five months the time in which the industry was allowed to go on relying upon the interpretations.

In accordance with the official interpretations made in December, 1938, the League reported to the Market Administrator sales of surplus milk sold as cream outside the "Marketing Area" during the period in question, September 1, 1938 to January 31, 1939, and July 1, 1939 to April 30, 1940, in the III-D classification. All of such sales were made in Northern New Jersey (R. 63) and none of the cream or milk sold as cream involved in this action reached destination in the New York Milk Marketing Area defined as the City of New York and counties of Nassau, Suffolk and Westchester (R. 63, 11, 12, 82), although some of the cream so sold was shown to have reached destination in approved counties and some of it passed through approved counties in reaching destination in unapproved counties (see Charts R. 196-199).

On October 20, 1939, the first audit charge or billing was made against the League by the auditors of the Market Administrator in the sum of $48,575.78 as a result of their action in re-classifying the sale of cream above described for the period of September, 1938, to January, 1939 (R. 51, 63). No reason for the audit charges or billing was shown. Further re-classification audits were made from time to time bringing the total of the sum so demanded for the entire period in question to $157,060.62. All such sums were paid by the League under protest (R. 64).

As a result of this re-classification and demand and payment under protest of such sums, the League was refused credit for the cooperative payments made on the re-classified milk (R. 63, 115), lost the benefit of the low price III-D classification in its pooling account with the Market Administrator, and was required to pay adminis-

trative assessments prescribed on the reclassified Class II-A (unpriced) milk (R. 63, 115).

Other than the re-classification audit billings on October 20, 1939, and thereafter, there were no indications whatever of a change in the III-D classification as officially interpreted in December, 1938. No public announcements or statements were made to the industry of any change in such interpretations or administrative applications of the order previously given.

No industry conferences were held on the changes as they had been held on the December, 1938, rulings.

A memorandum by Mr. S. A. Aldrich, an auditor in the Market Administrator's office, stated to have been issued February 14, 1940, to members of his staff only, stating his reasons for the re-classification was not publicly announced to the industry nor was it brought to the attention of the League until the time of trial (R. 130). The Aldrich memorandum expressed a new theory of classification without citation of reason or law or ruling in the name of the Secretary or of the Market Administrator, to the effect that if cream moves from an unapproved county to an approved county, then it is II-A unpriced (R. 130, 131, 55, 53). It did not specifically refer to or overrule the previous publicly announced official interpretations of December, 1938, particularly the one (R. 131) that "when a plant is not approved for the marketing area the dealer is not considered a handler at that plant."

Stipulation of Facts between Counsel at Pre-hearing Conference

On March 15, 1940, and pursuant to the remedy provided by Section 8c (15) (A) of the AMAA (7 U. S. C. 608c (15) (A)), the League filed a petition with the Secretary of Agriculture for a refund of sums paid under protest.

A stipulation of facts was entered into thereafter between counsel for the League and counsel for the War Food Administrator at a pre-hearing conference between presiding officer Gifford on January 24, 1944 (R. 61-78). This stipulation was read into the record by the presiding officer at the pre-hearing conference pursuant to his prescribed duties (4 C. F. R. 1943 Cum. Supp. Section 900.58) to shorten, simplify and expedite the issues. The functions of the War Food Administrator with respect to this matter were later exercised by the Secretary of Agriculture (R. 117). A motion to show only enough facts to secure a ruling of the issues was made before the presiding officer and was referred to the judicial officer Flavin and granted by him January 24, 1944 (R. 116). The presiding officer made no objection whatever as to the provisions of the stipulation.

The stipulation contained statements as to the application to the questions in this case of the officially approved and publicly announced official interpretations made in December, 1938. As to the question (a) under what circumstances an operator is or is not a handler with respect to an unapproved plant, it was stipulated "the delivery of the cream shipped to such plant was not a receipt or purchase by a handler" (R. 68); as to the question (b) of whether shipments of cream to an unapproved county automatically takes a III-D classification, it was stipulated that the Borden plant at Newark "was not approved by any health authority for the receiving or shipping of milk to the marketing area and the operator with respect to such plant was not a handler, and cream shipped to such plant would be in the first instance delivered to a purchaser in an unapproved county who was not a handler with respect to such plant" (R. 72); as to the question (c) whether the second plant for classification purposes may be a second cream plant, it was stipulated that "The words 'second plant' in the second proviso in Section 1, of

Article III to said order means 'second cream plant.' This interpretation was made in December, 1938, and retroactive to September, 1938" (R. 77).

The presiding officer filed his report recommending a dismissal of the petition on December 2, 1944 (R. 117, 13).

The oral argument on exceptions to the presiding officer's report was then held before judicial officer Flavin on July 18, and 20, 1945 (R. 117, 12, 57). Then and for the first time the judicial officer, in speaking of the stipulation which had been cited to him stated (R. 57): "I do not feel necessarily bound by the stipulations as to what I consider either conclusions of fact or legal conclusions."

A colloquy between the judicial officer and counsel for both the League and the War Food Administrator then followed (R. 58-60). Both counsel for the League and counsel for the War Food Administrator assured the judicial officer that the stipulation followed the historical background in complying with the facts in the case and the official interpretation as to "handler" (R. 58, 59). The judicial officer inquired and was assured by counsel for both parties that the statements so made had been made with reference to the question of III-D classification (R. 58, 59). The judicial officer appeared convinced on the point. Counsel requested leave to file briefs if he had doubt upon it. He never asked for briefs. Counsel pointed out that there was no need of filing briefs if the judicial officer should find no doubt (R. 60).

The judicial officer, upon filing his decision on March 6, 1946 (R. 158) which dismissed the petition for the most part, conceded in his statement of conclusions that both the petitioner and the Department of Agriculture relied upon the official interpretation as to the word "handler" (R. 144, 145, 130), and that the terms of the order were not clear and left room for differences of opinion on interpretation and application (R. 158). He, nevertheless, re-

fused to follow the application of the official interpretations as to the III-D deliveries at Newark, an unapproved County, upon the ground that the stipulations were of legal conclusions (R. 146).

No notice following the colloquy with counsel and prior to this decision of the judicial officer was given to the League as to the judicial officer's decision on this point. If the case had been remanded in accordance with the spirit of due process, the League believes it could have proved conclusively that the December, 1938 interpretations were authorized by the Secretary of Agriculture and were made by the responsible officials of the Department of Agriculture who drafted the order and who were charged with the duty of supervising administration of the order. The League believes that it could remove any doubt as to the record expressed by the Court of Appeals (R. 194), and show that the interpretation that a "handler" is not a handler at an unapproved plant (R. 130) has been continuously and universally applied.

Decisions of the Lower Courts

The decision of the judicial officer was affirmed by the District Court for the Northern District of New York upon review proceedings taken pursuant to the special provisions contained in the Agricultural Marketing Agreement Act (7 U. S. C. A., Section 608c (15) (B)) and was further affirmed upon appeal to the Court of Appeals for the Second Circuit. Different reasons were cited for the affirmance in each Court's opinion.

The Judicial Officer. In this statement of findings and conclusions, the judicial officer held:

As to the official interpretations. The judicial officer referred to them as making the III-D definition redundant,

that they were contrary to the administrative practice that cream sold in an unapproved county was not entitled to III-D classification if it moved on to an approved county, citing the Aldrich memorandum of February 14, 1940, without explanation of the lapse of time between that memorandum and the official interpretations of December, 1938; that the official interpretations were merely concessions to handlers (R. 147); and that a III-D classification was possible only at the first cream plant, because a change in form was contemplated by the use of the word "utilization" (R. 144, 145).

As to the stipulation. The judicial officer held it was a stipulation of legal conclusions not binding on the Secretary. He did not comment on the understanding expressed in the colloquy with counsel (R. 57-60), that before decision on the point, the judicial officer would receive briefs on the subject nor why he did not follow that understanding (R. 146).

The District Court. As to the official interpretations. The Court misapprehended and misstated the official interpretations by adding a qualifying clause not present in the original. The Court held that the cream should remain in an unapproved county (R. 173), and that the classification at the first plant was justified (R. 170).

As to the stipulation. It was a stipulation of legal effect of facts not binding on the Secretary and not binding on the Court (R. 172, 173), without comment on the lack of opportunity of counsel to present a case on the points as to which the stipulation had not been accepted.

The Court of Appeals. As to the interpretations. The decision of the Court of Appeals was largely on a new theory that the words "not a handler" in the Class III-D definition meant not a handler anywhere so that a handler having a plant in an approved county could not be "not a

handler" within the definition of III-D (R. 177). Until this decision of the Court of Appeals, the official interpretation (a) that a handler receiving cream at an unapproved plant is not a handler with respect to that plant (R. 131) had been left unchanged. The Court held that delivery under III-D classification was not effective until arrival at a plant from whence distributed. The Court further held that the "second thought of the Administrator was better than his first" and that the Court was not bound to accept his early ruling, apparently referring to interpretation (b) that cream received at an unapproved plant automatically takes a III-D classification (R. 55); that the administrative ruling issued only a few months after the promulgation of the regulation was "tentative,"* or if not, should have been (R. 193). The Court did not comment on the fact that the interpretations contained no statement that they were "tentative,"* or as to the lapse of time or things done between the change of rulings, except that upon rehearing the Court in a *per curiam* opinion (R. 210) stated:

> "The plaintiff's petition for rehearing is denied; but the judgment entered upon our mandate is not to preclude the defendant from reconsidering the plaintiff's petition for refund if he be disposed to do so because of any matters stated in the plaintiff's petition for rehearing in this court."**

The Court of Appeals left undecided the interpretation (c) mentioned above that classification may be in accordance with the second cream plant (R. 77) which had not

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* Apparently meaning not binding.

** Pursuant to this direction the League renewed negotiations with the Department of Agriculture for a settlement of its claims and was advised by telegram signed by John I. Thompson, Asst. Administrator for Marketing, dated May 20, 1949, that "Department can find no grounds for settlement of claim. * * *"

been changed until the decision of the Judicial Officer, although for purposes of argument, assumed that the petitioner had the option of classifying either at the first or at the second plant (R. 186).

As to the stipulation. The stipulation attempted to put a gloss on the order and the Judicial Officer was right in not accepting it. The petitioner was not misled in presenting the facts on the stipulation and it asked only to present briefs. The Court did not comment on the fact that the stipulation merely incorporated the interpretations nor on the fact that the argument before the Judicial Officer was not a hearing *de novo*.

Basis of the Court's Jurisdiction

The judgment of the Court of Appeals was entered on February 1, 1949 (R. 200).

A petition for rehearing was entertained by the Court of Appeals and denied on March 26, 1949 (R. 211).

The time to file this petition for certiorari was extended to July 20, 1949, by order of Mr. Justice Jackson dated May 27, 1949 (R. 212).

Authority for judicial review of the opinion of the judicial officer acting for the Secretary of Agriculture is contained in 7 U. S. C. § 608 (c) (15) (B).

The jurisdiction of this Court rests upon 28 U. S. C. Sec. 1254 (1).

Questions Presented

1. (a) Whether interpretations of an administrative regulation, the application of the provisions of which regulation are not clear, which interpretations have been made after a formal conference with the industry and approved by officials directly responsible for the administration of

such regulation and publicly announced by the Market Administrator, the official designated to administer such regulation, are binding on the Secretary of Agriculture during such time as no contrary or different interpretation was made known to the persons proceeding according to the terms of such interpretations publicly announced.

(b) Whether such interpretations of such an administrative regulation in the early stages of its administration, are "tentative" in nature and subject to change retroactively, and without notice although not expressly declared so to be in the interpretations themselves.

(c) Whether such formal administrative interpretations may be changed retroactively and without notice a year and a half later by informal action and detailed administration by subordinate auditors.

(d) Whether transactions made in accordance with formal interpretations of an administrative application of a regulation and in accordance with such interpretations by the private party and the execution of a stipulation incorporating such interpretations by counsel for both the Government and the private party, estops the Government from exacting the additional payments from the League in this case.

2. (a) Whether the judicial officer properly conducted the proceeding before him and the adjudication on the record in this case as previously taken before the presiding officer.

(b) Whether after the record in an administrative hearing before a presiding officer has been closed and the matter subsequently proceeds for adjudication on that record before a judicial officer, a different person than the presiding officer, who impliedly agrees to receive briefs with respect to a stipulation of facts between counsel if he should be in doubt of its binding effect, the judicial officer may then decide the issue refusing to follow the stipula-

tion without notifying counsel or giving reason therefore, and without sending the case back to the presiding officer to receive evidence, if desired, by counsel and without request on part of counsel to be relieved of the stipulation.

3. (a) Whether there is sufficient question as to the correctness of the construction and application of the provisions of Order No. 27 to the sales in controversy to warrant remanding the matter to the Department of Agriculture for further proceedings.

(b) Whether Article III, Section 1 of Order No. 27 authorized classification of milk on the basis of utilization or movement beyond the second cream plant or after sale by the handler.

(c) Whether the Class III-D definition in Order No. 27, in referring to delivery of cream to a purchaser, not a handler, is correctly construed as including the transportation of the cream by the purchaser to his plant after transfer of possession and title to the purchaser.

(d) Whether the phrase "not a handler" in the Class III-D definition of Order No. 27 is correctly construed as excluding the operator of an unapproved plant who is also the operator of an approved plant elsewhere.

Reasons Relied Upon for the Allowance of the Writ

The Interpretations. The respondent attempted to change the construction of formal administrative interpretations by informal, belated and retroactive administrative application. We believe the propriety of this practice to be an important question of Federal Law which has not been, but should be decided by this Court. The holding of the Court of Appeals for the Second Circuit in this respect, is contrary to that of the Court of Appeals for the Ninth Circuit.

The subsequent changes neither formally considered at a meeting of the industry on the subject nor formally announced, as were the previous interpretations, and even entirely devoid of any evidence of official approval appearing in the record, even by the Market Administrator, nevertheless, were given paramount authority by the decisions of the judicial officer and the lower Courts in this case and even given a retroactive effect. These decisions in this respect, are contrary to law, contrary to due process and contrary to the Marketing Agreement Act of 1937, and were a taking of private property without just compensation.

The Court of Appeals in stating that the "second thought of the Administrator was better than his first," clearly shows the Court's misapprehension of the nature of the administrative action in this case taken in December, 1938. That "first thought" of the Market Administrator was not merely a thought of the Administrator, but rather a solemn public announcement of an administrative interpretation and application of doubtful points of wide scope and great importance in the industry and made after a conference between the industry and responsible Government officials. The "second thought", moreover, was not that of the Administrator but of a subordinate.

The decision of the Court of appeals upholding the changes in administrative application of a regulation of doubtful clarity made retroactive for more than a year and without notice to the persons proceeding according to the interpretations of the order previously and publicly announced, is contrary to the applicable decisions of this Court and is contrary to the decisions of other Circuits.

The change in the official interpretations of December, 1938, not made known by the Market Administrator, but only by a mere billing of charges, created heavy liabilities arising out of completed sales made during the period involved herein and especially all those made before October

20, 1939, and which liabilities did not exist at the time the transactions took place.

The retroactive change in the official interpretatons and the consequent extension of the liability of milk handlers for the completed sales of milk in question, made the milk sold and paid for milk of a different class and of a considerably higher priced class, then that actually sold and paid for, and in effect made new agreements between the petitioner and its customers and imposed upon the petitioner a liability which it could not have foreseen and to which it did not assent.

Order No. 27 conferred no right upon the Administrator, under the guise of re-classification, retroactively to change an official interpretation. Neither did the Agricultural Marketing Agreement Act authorize the Secretary to issue retroactive regulations.

The decision that administrative interpretations officially made and announced shortly after the promulgation of a regulation the provisions of which are not clear, are "tentative" in nature although not expressly stated to be so at the time of their issuance, so that later interpretations retroactive in nature are authorized, is a decision contrary to law and of the greatest importance to the entire industry.

These interpretations issued substantially contemporaneously with Order No. 27 had the force of law. They were discussed at a public meeting of the industry and approved by the Federal and State officers in charge of the promulgation and administration of the order. The failure to enforce these interpretations of December, 1938, is contrary to the applicable decisions of this Court.

The Stipulation. The decision that an administrative judicial officer in his conduct of a hearing upon a record taken before another official as presiding officer, may de-

prive the petitioner of a substantial right by impliedly agreeing to receive briefs before deciding whether a stipulation of facts between counsel is binding, and then arbitrarily proceed to decide the point without notice to counsel or sending the case back to the hearing officer to take proof of facts stipulated, is a decision on a point which has not been, but should be decided by this Court and is also contrary to the applicable decisions of this Court.

Construction of the Order. The decision of the Court of Appeals for the Second Circuit that the word "delivered" as used in Article III, Section 1, paragraph 7, of Order No. 27, is to be construed as including the transportation of milk after transfer of possession from a handler to a plant of a purchaser, is contrary to the decisions of this Court and the Courts of Appeals of other Circuits.

The decision of the Court of Appeals in this case that the classification and consequent pricing of sales of milk by the petitioner as a handler under the terms of Order No. 27 can be based upon operations of a purchaser from the handler subsequent to such sale is in conflict with the holding of the Court of Appeals for the Seventh Circuit.

The decision that an operator of an unapproved plant in one county where the cream was sold, who also operated an approved plant in another county, was not within the Class III-D description "not a handler" because of the operation of such other approved plant, is a decision contrary to the terms of the order and to the applicable decisions of this Court.

The decision of the Court of Appeals, in effect that classification of milk can be based on movement or utilization beyond the second cream plant and after sale by the handler, is contrary to the express terms of Section 1 of Article III of the Order.

Importance of this Application. The questions presented in this petition for certiorari are questions of federal law and are all of vital importance to all persons affected by the administration of orders issued by the Secretary of Agriculture under the Agricultural Marketing Agreement Act of 1937, of which about thirty relate to milk control. The New York Order No. 27 alone involves a distribution value of about nine hundred thousand dollars per day.

The great part of the work of the milk marketing industry is done under administrative supervision and control. Orders and hearings and amendments and interpretations are matters of daily occurrence. The decision of the Court of Appeals on the questions of administrative practice, raised by the practices resorted to in this case, has brought confusion into a vital part of the business, and the subject and the industry is in need of a clarifying decision by this Court.

Wherefore, it is respectfully submitted that this petition for writ of certiorari to review the judgment in the United States Court of Appeals for the Second Circuit should be granted.

SEWARD A. MILLER,
Attorney for Petitioner,
11 West 42nd Street,
New York 18, New York.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1949

No. .....

DAIRYMEN'S LEAGUE CO-OPERATIVE ASSOCIATION, INC.,

Petitioner,

v.

CHARLES F. BRANNAN, as Secretary of Agriculture of the United States,

Respondent.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Opinions of the Courts Below

The opinion of the Court of Appeals for the Second Circuit is reported in 173 F. 2d 57, and is printed in the record herein at pages 182-199. A *per curiam* opinion of the Court of Appeals rendered upon petition for reargument is printed in the record herein at page 210.

The opinion of the District Court for the Northern District of New York is printed in the record herein at pages 159-174.

The preliminary statement, findings of fact and conclusions of law of the judicial officer is reported in 5 A. D. 143 and is printed in the record herein at pages 114-158.

Specification of Errors

The Court of Appeals for the Second Circuit erred in making the following rulings:

(1) "As an administrative interpretation, the plaintiff invokes another 'memorandum' which Harmon issued in December, 1938, in which he ruled that 'when a plant is not approved for the marketing area the dealer is not considered a handler at that plant.' This was issued only a few months after the Regulation itself was promulgated, and at a time when, in the nature of things, interpretation was tentative, or, if it was not, ought to have been" (R. 193).

(2) "We are satisfied that the second thought of the Administrator was better than his first; and we do not feel bound to accept the early ruling" (R. 193).

(3) "It is true that in cases of doubtful interpretation, long usage in reliance upon an administrative interpretation often counts for much. We need not say how far we should feel bound by the interpretation if the plaintiff had proved that it did conduct its business in reliance upon the 'memorandum' during the period in question" (R. 194).

(4) "Apparently, the conclusiveness of this agreed definition of the word, 'handler,' was first questioned by the 'judicial officer' at a hearing on July 20, 1945. He at that time 'warned' both parties that he might not feel bound by 'legal conclusions as to whether a person is a handler.' A discussion followed but all that we can find is a request by the plaintiff to be allowed 'to submit briefs on that

point,' if the 'judicial officer' decided not to accept the stipulation. Although the plaintiff complains that no leave was ever given to file such a brief, we cannot see, in view of the opportunity for argument afforded both in the district court and here, that this is grievance to be considered" (R. 192).

(5) "The 'judicial officer' was entirely right in not accepting the stipulation as final. It attempted to put a gloss upon the Regulation and the Regulation had the force of law" (R. 192).

(6) "The plaintiff invokes a 'memorandum' of Harmon, the Administrator at the time, made on December 8, 1938, which declared that 'when milk is diverted from a strictly fluid receiving station to a separating station, and from there on to a manufacturing plant, the manufacturing plant * * * is the second plant where the product moved as cream.' Assuming this to be a proper interpretation, it does not apply here, because the Paterson 'plant' was not a 'manufacturing plant,' but only a distributing plant. Part 'A' of Claims Three and Four was, therefore, properly dismissed" (R. 191).

(7) "Since the Jansen Company had a 'plant' in an 'approved county,' the cream delivered to it at its Bergen County 'plant' was delivered to a 'handler,' and was not within III-D" (R. 189).

(8) "After October 1, 1939, even though we consider the transfer as delivery to a purchaser, the cream was nevertheless not within III-D because the Borden Company which owned the Newark 'plant,' was a 'handler' by virtue of its ownership of other 'plants'" (R. 191).

(9) "All we need hold as to Claim One is that when a 'purchaser' receives cream in an 'unapproved county' and

takes it at once to a 'plant' in an 'approved county,' his status as 'handler' of that milk is to be determined by the location of that 'plant' " (R. 187).

(10) "The cream sold to the dealers and sub-dealers from the Newark 'plant' was in part delivered to them in Newark and in part 'on routes' or by express. The only remaining question as to these is whether they were 'handlers'; but in view of what we have said as to 'delivery' this is not important. So far as appears, all had their place of business in 'an approved county,' and the 'delivery' was in (fol. 191) that county, regardless of whether they took possession at the plaintiff's platform in Newark, or received the cream where they did business. Claim Two was properly dismissed" (R. 189).

(11) "The plaintiff does indeed suggest, but only in an indirect way, that, if construed as we are construing it, the Regulation is invalid. Plainly, we are in no position to decide that question. The Regulation was the result of long investigation and deliberation and the evidence on which it was based is not before us" (R. 194).

(12) "The question is whether this cream was properly classified under subdivision (b) of § 927.4 as II-A, or should have been classified as III-D" (R. 185).

ARGUMENT

POINT I

The question whether formal administrative interpretations of a milk marketing order may be changed retroactively by informal action of subordinates of the Market Administrator has not been but should be decided by this court, and the decision of the Court of Appeals permitting such practice is contrary to the applicable decisions of this court and of other circuits.

The propriety of the administrative action in this case upheld by the Court of Appeals of the Second Circuit in changing retroactively and by a mere billing of extra charges the previous formal and official interpretation of a regulation of doubtful clarity is contrary to the law of the 9th Circuit followed in the 8th Circuit and contrary to the applicable decisions of this Court.

F. Uri & Co. v. *Bowles*, 152 F. 2d 712 (C. C. A. 9, 1945);
Porter v. *Tanker Gas, Inc.*, 68 F. Supp. 103 (D. C. D. Minn. 4th Div., 1946).

The error of the Second Circuit seems to have been in the assumption that the change in the interpretation was of equal authority and formality with its making. The Court states:

> "We are satisfied that the second thought of the Administrator was better than his first" (R. 193).

On the contrary the interpretations in accordance with which the petitioner conducted its business were publicly announced to the industry, were issued after a formal conference with responsible representatives of the government

and industry, were approved by the officials directly responsible for the administration of the regulation and were issued as to provisions of doubtful clarity in the regulation and within a short time after the regulation was effective (R. 53, 59, 77, 131). The only attempt to change these interpretations prior to the decision of the Judicial Officer in 1946 (R. 114-158) was the billing of additional charges by the Market Administrator's auditors, the first such billing having been made on October 20, 1939. The billings were made as a result of reclassification of cream sales (R. 51, 63) and no reason was given for such reclassification as was contrary to the official interpretations. Even the memoranda of Mr. Aldrich, an auditor of the Market Administrator's office, issued February 14, 1940, was not brought to the attention of the League until the time of trial in 1945 and by government trial counsel (R. 130). The reclassifications were nothing but arbitrary actions of subordinates made without reason and without basis in law.

A further basis of the Circuit Court's error in approving the administrative action in this case appears in the ruling on interpretation (a), *supra,* p. 6, that a handler receiving cream at an unapproved plant is not a handler with respect to that plant (R. 131). The Court ruled that this interpretation was "tentative, or, if it was not, ought to have been" (R. 193). The fact is that as to this interpretation the Market Administrator never did change his ruling. That a person to be "not a handler" must not be a handler anywhere was the notion solely of the Court of Appeals of the Second Circuit and was not announced until the decision of the Court in this case on February 1, 1949.

As will be seen from the context (R. 130-131, 55, 53, 77) none of these interpretations was issued in tentative form. The authority conferred on the Secretary was to issue orders and amendments and suspensions thereof containing locations at which delivery of milk, or any use

classification thereof is made to handlers (7 U. S. C. Sec. 608c(5)(A)(3), and is made provisional upon approval of two-thirds or three-fourths of the producers and subject to various adjustments (*Agricultural Marketing Agreement Act,* Secs. 8c(5)(B), 8c(8), 8c(16)(C) and 8c(17), (7 U. S. C. Secs. 608c(5)(B), 608c(8), 608c(16)(C) and 608c(17)). The authority of the Market Administrator was to administer the terms and provisions of the order Art. II, Sec. 3 (R. 84) which confers authority to make interpretations not inconsistent with the terms of the order (*Green Valley Creamery* v. *United States,* 108 F. 2d 342, 347 (C. C. A. 1, 1939)). But neither the act nor the order authorized or permitted a retroactive interpretation and application by way of a billing of extra charges on reclassification, creating heavy liabilities as to petitioner's past transactions and the payments exacted from the petitioner by the Market Administrator were illegally exacted according to the applicable decisions of this Court and other Circuits.

> *Brimstone R. & C. Co.* v. *United States,* 276 U. S. 104, 122 (1928);
> *Barron Coop. Creamery* v. *Wickard,* 140 F. 2d 485, 488, (C. C. A. 7, 1944).

As we have shown, the Market Administrator who announced the official interpretations (*supra,* p. 6) shortly after the promulgation of the order, never did announce any contrary rulings. It was only his subordinate who sought to change them, first by billings of additional charges on reclassification and later by an inter-office communication in the auditing department and signed only by the auditor and not by the Market Administrator. It is the first official interpretation issued shortly after the promulgation of the order that carries controlling weight in this Court.

> *White* v. *Winchester Country Club,* 315 U. S. 32, 41 (1942);

United States v. *American Trucking Ass'n,* 310 U. S. 534, 549 (1940);
Bowles v. *Seminole Rock & Sand Co.,* 325 U. S. 410, 413-414 (1945).

The decision of the Court of Appeals in approving the retroactive administrative action in this case is contrary to the applicable decisions of this Court which have consistently condemned retroactivity in administrative action.

Arizona Grocers Co. v. *A. T. & S. F. R. R.,* 284 U. S. 370, 389 (1932);
Miller v. *United States,* 294 U. S. 435, 439 (1935);
United States v. *McDaniels,* 7 Pet. 1, 15 (1833).

It should be axiomatic that, subordinates in the Market Administrator's office cannot overrule the Market Administrator and responsible officials in the Department of Agriculture. Water can not rise higher than its source.

POINT II

The arbitrary action of the judicial officer accepted by the Court of Appeals was a denial of a fair hearing to the petitioner and is contrary to the applicable decisions of this court.

At the pre-hearing conference, in order to obviate the taking of much testimony and to simplify and reduce the record, the parties agreed upon a stipulation which in part embodied the official administrative interpretations issued in December, 1938 (R. 61, 68, 72, 77). This stipulation was then read into the record by Presiding Officer Gifford. Over a year later, upon the argument before Judicial Officer Flavin and without any application or request to the relieved from the stipulation by either of the parties, the stipulation, as to the interpretations, was rejected by Judicial Officer Flavin (R. 146) without giving the petitioner

the opportunity to present in evidence the facts as to the interpretations involved in the stipulation.

The Judicial Officer had not been present at the hearing on the introduction of evidence and had only heard the argument on the evidence introduced at the hearing over a year after the hearing or trial of the action took place. The Judicial Officer first stated that he might not feel himself bound by the stipulation but then upon the circumstances being explained appeared to be convinced to the contrary and impliedly agreed to receive briefs if later on he should be in doubt (R. 59-60). The Judicial Officer gave no reason why he had not notified counsel before deciding the point of the validity of the stipulated interpretations after impliedly agreeing to receive briefs on the point. He acted "without adequate determining principle and without reason", as this Court stated in *United States* v. *Carmack,* 329 U. S. 230, 247 (1946).

The reason given by the Judicial Officer for not accepting the stipulations as to the interpretations was that the stipulated facts agreed upon by counsel were legal conclusions not binding upon him. In doing so he overlooked and ignored the fact that the stipulated facts objected to were official interpretations and an application of them to the facts of the case. This is shown by his reference to the interpretations as being merely "concessions to handlers" (R. 147).

In failing to accept the stipulated interpretations without giving the League an opportunity to file briefs on the subject or to take other action, such as to have the case sent back to the Presiding Officer for the taking of testimony upon the matter covered by the stipulation, and in failing to notify counsel before deciding the point as to the stipulated interpretations, the Judicial Officer arbitrarily deprived the petitioner of a full and fair hearing in accordance with law.

Morgan v. *United States,* 304 U. S. 1, 18 (1937);

Interstate Commerce Commission v. *Union Pacific*, 222 U. S. 541, 547 (1911);
Agricultural Marketing Agreement Act, Sec. 8c (15) (A), (7 U. S. C. 608c(15) (A)).

In the *Morgan* case, this Court stated, speaking through Mr. Chief Justice Hughes, and referring to a proceeding before the Secretary of Agriculture under the Packers and Stockyards Act:

> "* * * But a 'full hearing'—a fair and open hearing —requires more than that. The right to a hearing embraces not only the right to present evidence but also a reasonable opportunity to know the claims of the opposing party and to meet them. The right to submit argument implies that opportunity; otherwise the right may be but a barren one. Those who are brought into contest with the Government in a quasi-judicial proceeding aimed at the control of their activities are entitled to be fairly advised of what the Government proposes and to be heard upon its proposals before it issues its final command.
>
> No such reasonable opportunity was accorded appellants * * *"

The Judicial Officer in deciding the issue of the stipulation without first notifying counsel not only laid the basis for his own error in failing to realize the official character of the interpretations but also provided the basis of the further error of the Court of Appeals in referring to the wrong interpretation quoted both in the opinion of the Judicial Officer (R. 129) and in the opinion of the Court of Appeals (R. 191).

This interpretation quoted both by the Judicial Officer and the Court of Appeals had nothing to do with the case and it had not been relied upon by the petitioner, and the

Court of Appeals in stating that the petitioner had relied upon it was mistaken in saying so. The interpretation relied upon by the plaintiff was that stated in paragraph 7 of the Harmon memorandum (R. 55). The Judicial Officer quoted only paragraph 1 of this memorandum (R. 129). The Court of Appeals repeated the error.

POINT III

The construction of the terms of Order No. 27 by the Court of Appeals was contrary to the terms of the order and contrary to the applicable decisions of this Court and other circuits.

Throughout this case we are concerned with the construction and application of an order or regulation and interpretations of the regulation rather than a statute. No question is made in this case that the order, as we construe it, does not fairly carry out the statute. However, we believe that in case of both the regulation and the statute the rule of construction in this case is the same. As the Court said in *Barron Co-operative Creamery* v. *Wickard,* 140 F. 2d 485, 488, C. C. A. 7, (1944) "administrative orders, like statutes, are not to be given strained and unnatural construction."

The Court of Appeals in effect rewrote the terms of Order No. 27 so as to give it a strained and unnatural construction by:

(1) Adding to the words "not a handler" in the III-D classification the words "and not a handler anywhere" (R. 189, 191);

(2) Adding to the words "not a handler" in the III-D classification the words "and not taken immediately to a plant in an approved county" (R. 187);

(3) By replacing the word "delivered" in the III-D classification with the words "transferred without subsequent transportation to or through an approved county" (R. 189);

contrary to the applicable decisions of this Court and other Circuits.

Addison v. *Holly Hill Fruit Products,* 322 U. S. 607, 617-18 (1944);
Miller v. *United States,* 294 U. S. 435, 439-40 (1935);
Iselin v. *United States,* 270 U. S. 245, 251 (1926);
Lindstrom v. *Comm'r. of Int. Rev.,* 149 F. 2d 344, 346 (C. C. A. 9, 1945);
Barron Coop. Creamery v. *Wickard,* 140 F. 2d 485, 488 (C. C. A. 7, 1944).

Although the Court of Appeals did not follow the decision of the Judicial Officer that the use of the word "utilization" in Article III, Section 1 of the order meant a change in form (R. 144, 145, 77), and assumed for purposes of argument that the petitioner had the option of classifying at either the first or second cream plant (R. 186), it seems clear, nevertheless, that the Court of Appeals fell into error in holding that the III-D classification could be based upon utilization at a third or even a fourth plant by transfer thereto in an approved county. In so doing, we submit that the Court of Appeals held directly contrary to the express terms of the second proviso clause in Article II, Section 1 of the order to the effect that classification of milk "at the first plant may be in accordance with its utilization at such second plant" (R. 86).

The word "delivered" in the Class III-D description was not defined in the order and therefore the plain and natural meaning as given to it by the common run of men should have been given to this word. Instead the Court of

Appeals in effect upheld the Judicial Officer who held (R. 140, footnote) that the word "delivered" was a word of many meanings and that actual transfer of possession and payment of the price could not control in interpreting the terms of the III-D provision. The decision of the Court of Appeals in this respect is contrary to the applicable decisions of this Court and of other Circuits.

Crane v. *Comm'r of Int. Rev.*, 331 U. S. 1, 6 (1947);
Addison v. *Holly Hill Fruit Products*, 322 U. S. 607; 617-618 (1944);
Anderson v. *Mercado*, 163 F. 2d 303 (C. C. A. 1, 1947);
Schreffler v. *Bowles*, 153 F. 2d 1, 3 (C. C. A. 10 (1946)).

The two principal plants involved here, the League's plant and Borden's plant at Newark, neither received milk from producers nor sold milk in the marketing area and came within the exception to the definition of "handler" stated in Article I, Sec. 1, Par. 6 (R. 86). None of the cream or milk reclassified in this case was sold in the marketing area nor did any of the milk or cream so reclassified find its way into the marketing area. If the League and the Borden Company are to be regarded as handlers at these Newark plants, then the decision is contrary to the statutory definition and to the facts as to the reclassified sales of milk sold at these plants.

Under the Class III-D description contained in the order, the handler at an unapproved plant was not required to follow the cream sold to see in what use classification it was finely disposed of or used, and the decision of the Court of Appeals in this case, that the III-D classification and consequent pricing of the sale of cream in an unapproved county may be based upon operations of the pur-

chaser subsequent to such sale, is contrary to the decision of the Court of Appeals of the 7th Circuit.

> *Barron Coop. Creamery* v. *Wickard*, 140 F. 2d 485, 488 (C. A. A. 7, 1944).

The Court of Appeals for the 7th Circuit in the *Barron* case considered a case arising under the Chicago Milk Marketing Order, and a reclassification by the Market Administrator of milk "disposed of" in Class III or butter which was ultimately used in making ice cream or Class II. The Court said at page 488:

> "Nothing in this order required the handler to look beyond his own disposition of the milk. Nothing in the order required him to pursue the milk and milk products to see in what use classification they were ultimately disposed of. If the handler disposed of the milk in the form of butter in good faith and not colorably to avoid this order, the classification was fixed by the disposition he made of the milk and not by the disposition or utilization some one else made at some subsequent time. The plaintiffs' sale of their butter to the Bowman Dairy Company was the disposition for which they were required to account. The resale of the butter in the form of ice cream by Bowman's vendee was not a disposition made by the plaintiffs for which they could be held accountable under the order."

The rules of construction of this Court and the other Circuits being contrary to the construction adopted and enforced by the Judicial Officer and the lower courts, it seems clear that the reclassifications and demands for additional payments made by the subordinates of the Market Administrator in this case without reason or basis in the law were unlawful, unauthorized under the terms

of the order, and were arbitrary, and that the judgments of the Judicial Officer and the lower courts were not in accordance with law.

CONCLUSION

The decision of the Judicial Officer and the judgment of the lower Court, as affirmed by the Court of Appeals, were not in accordance with law and should be reversed.

Respectfully submitted,

SEWARD A. MILLER,
Attorney for Petitioner.

FREDERICK P. LEE,
MYRON SCOTT,
of Counsel.

INDEX

	Page
Opinions below	1
Jurisdiction	1
Questions presented	2
Statute and order involved	3
Statement	4
Argument	7
Conclusion	20
Appendix	21

CITATIONS

Cases:

Barron Co-op. Creamery v. *Wickard*, 140 F. 2d 485	19, 20
Cloverleaf Dairy Co. v. *Patterson*, 315 U. S. 148	15
Davies Warehouse Company v. *Bowles*, 321 U. S. 144	16
Estate of Sanford v. *Commissioner*, 308 U. S. 39	15
Federal Crop Insurance Corporation v. *Merrill*, 332 U. S. 380	14
Ginsberg & Sons v. *Popkin*, 285 U. S. 204	12
Irving Trust Co. v. *Maryland Casualty Co.*, 83 F. 2d 168, certiorari denied, 299 U. S. 571	12
McDonald v. *Thompson*, 305 U. S. 263, rehearing denied, 305 U. S. 676	12
Queensboro Farm Products, Inc. v. *Wickard*, 137 F. 2d 969	4, 9, 14
Singer v. *United States*, 323 U. S. 338	12
Stark v. *Wickard*, 321 U. S. 288	10
Swift & Co. v. *Hocking Valley Ry. Co.*, 243 U. S. 281	15
United States v. *Rock Royal Co-operative, Inc.*, 307 U. S. 533	3, 4
United States v. *Ruzicka*, 329 U. S. 287	6, 11
United States v. *San Francisco*, 310 U. S. 16	14
United States v. *Stewart*, 311 U. S. 60	14
Waddington Milk Co. v. *Wickard*, 140 F. 2d 97	4, 9

Statutes:

Agricultural Marketing Agreement Act of 1937, 50 Stat. 246; 7 U.S.C. 601 *et seq.*, reenacting, with amendments, the Agricultural Adjustment Act of 1933 (48 Stat. 31) as amended:	
Sec. 8c(15)(A)	5, 6

Statutes—Continued

	Page
Sec. 8c(7)(C)(ii)	14
Sec. 8c(17)	15
Act of April 4, 1940, 54 Stat. 81, Sec. 3, 5 U.S.C. 516a, *et seq.*	6
Miscellaneous:	
Federal Order No. 27, 3 F.R. 1945, 1957, 2100, 2102, 7 CFR, 1938 Supp. 927	3
7 CFR, 1938 Supp., 927.1	3
7 CFR, 1938 Supp., 927.2	11
7 CFR, 1938 Supp., 927.3	14
7 CFR, 1938 Supp., 927.4	4, 21
7 CFR, 1940 Supp., 927.1	3, 4
Federal Order No. 27, suspended, 4 F.R. 1259, 2377	3, 16
7 CFR, 1940 Cum. Supp. 900.69(a)(3)	16
10 F.R., 13769	6

In the Supreme Court of the United States

OCTOBER TERM, 1949

No. 202

DAIRYMEN'S LEAGUE CO-OPERATIVE ASSOCIATION, INC., PETITIONER

v.

CHARLES F. BRANNAN, SECRETARY OF AGRICULTURE OF THE UNITED STATES

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The findings of fact, conclusions, and opinion of the District Court (R. 159-174) are not reported. The opinion of the Court of Appeals (R. 182-195) is reported in 173 F. 2d 57.

JURISDICTION

The judgment of the Court of Appeals was entered on February 1, 1949 (R. 200). A petition

for rehearing was denied on March 26, 1949 (R. 210-211). The petition for a writ of certiorari was filed on July 19, 1949, within the period allowed by the order extending the time for the filing of the petition for certiorari (R. 212). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

(1) Whether in the administration of a milk marketing order issued pursuant to the Agricultural Marketing Agreement Act of 1937, as amended, a tentative interpretation by the Market Administrator, referring only to one of several essential elements of classification, estops and binds the Secretary of Agriculture with respect to the classification of milk under the order, where (a) the interpretation was reversed by the Market Administrator prior to the end of the period for which the petitioner asserts the accrual of its claims and (b) the handling transactions in the petitioner's claims do not comply with the other requirements for the classification contended for by it.

(2) Whether the case should be remanded for further hearing with respect to petitioner's claims under a part of the stipulation between the parties which set forth an erroneous legal conclusion and was, therefore, not binding on the courts, where the part of the stipulation which was rejected deals with only one of the essential elements of classifica-

tion and the handling transactions in the petitioner's claims do not comply with the other requirements for the classification contended for by the petitioner.

(3) Whether the action of the Market Administrator in reclassifying milk in 1939 and 1940, under certain regulatory provisions that have not been in effect since May 1, 1940, came within the limits of the order then in effect.

STATUTE AND ORDER INVOLVED

The statute involved is the Agricultural Marketing Agreement Act of 1937 (50 Stat. 246, 7 U.S.C. 601 *et seq.*), which reenacted, with amendments, the marketing provisions of the Agricultural Adjustment Act of 1933 (48 Stat. 31), as amended.

The order involved is Federal Order No. 27, regulating the handling of milk in the New York metropolitan marketing area. It was issued on August 5, 1938, effective September 1, 1938 (R. 79; 3 F.R. 1945, 1957, 2100, 2102; 7 CFR, 1938 Supp., 927). It was suspended (4 F.R. 1259, 2377) during the period January 31, 1939, to July 1, 1939.[1] The order is now in effect as amended and reissued with amendments from time to time (7 CFR, 927.1), but the provisions of the order relied on by the petitioner have not been in effect since the amendments of May 1, 1940 (7 CFR, 1940

[1] The suspension was in connection with the litigation which culminated in *United States* v. *Rock Royal Co-operative, Inc.*, 307 U. S. 533.

Supp., 927.1). The order is printed in the record (R. 79) and its pertinent parts are quoted or summarized in this brief.

Article III of Federal Order No. 27 (R. 79, 85-87; 7 CFR, 1938 Supp., 927.4) establishes nine classifications of milk.[2] The milk is classified in accordance with its utilization at, or movement from, the plant at which the milk is received from producers, except (1) if the milk is moved as milk from any plant outside the marketing area to a second plant outside the marketing area, the classification of such milk at the first plant may be in accordance with its utilization at the second plant, and (2) if the milk is moved as cream, plain condensed milk, or homogenized mixtures from any plant outside the marketing area to any second plant, the classification of such milk at the first plant may be in accordance with its utilization at the second plant.[3] The method of determining the uniform price and the operation of the producer-settlement fund or equalization pool are described in *United States* v. *Rock Royal Co-operative, Inc.*, 307 U. S. 533, sustaining the validity of the Act and the order.

STATEMENT

The petitioner, a handler of milk subject to Federal Order No. 27, reported certain handling trans-

[2] The pertinent provisions of the order are set forth in the Appendix, *infra*, pp. 21-22.

[3] The classification scheme is on the basis of plant movement rather than ultimate utilization. *Queensboro Farm Products, Inc.* v. *Wickard* (C.A. 2), 137 F. 2d 969; and *Waddington Milk Co.* v. *Wickard* (C.A. 2), 140 F. 2d 97.

actions in cream as being in Class III-D during the periods October 1, 1938, to February 1, 1939, and July 1, 1939, to April 30, 1940. It is stipulated (R. 63-64) that the Market Administrator reclassified the petitioner's cream, in these transactions, from Class III-D—the class contended for by the petitioner—to Class II-A. The petitioner had received certain credits in the operation of the producer-settlement fund, during each of the months, as a result of reporting the cream as being in Class III-D; and upon reclassification by the Market Administrator, demand was made by the Market Administrator for the payment of a sum equal to such credits. It is stipulated (R. 63-64) that the petitioner "paid under protest" $157,060.63 to the Market Administrator,[4] and then instituted this proceeding for the recovery of the sum alleged to have been illegally exacted.

This proceeding was initiated by the filing of a petition under § 8c(15)(A) of the Agricultural Marketing Agreement Act of 1937, as amended (7 U.S.C. 608c(15)(A)), requesting the Secretary of Agriculture to hold a hearing, on the claims of the petitioner, and to reverse the action of the Market Administrator in reclassifying the cream from Class III-D to Class II-A and to direct the Market Administrator to repay to the petitioner the sum claimed to have been illegally exacted. This section of the Act provides for a hearing on

[4] It is alleged by the petitioner (R. 12) that "approximately $145,000 was an illegal exaction."

any petition filed by a handler with respect to an order or obligation thereunder which the handler asserts is "not in accordance with law." *United States* v. *Ruzicka*, 329 U.S. 287. The ruling of the Judicial Officer[5] on the petition is "final, if in accordance with law" (7 U.S.C. 608c(15)(A)). Jurisdiction is conferred on the district courts to review a ruling of the Judicial Officer upon the institution of such action by the handler.

The petitioner contends that all of the handling transactions in its claims are within Class III-D. The petitioner relies on a tentative interpretation by the Market Administrator—subsequently reversed by the Market Administrator several months prior to the end of the period for which the petitioner asserts the accrual of all of its claims—as to the meaning of the phrase "not a handler" in the definition of Class III-D, and also relies, in connection with two of its five claims, on the part of a stipulation which, as petitioner alleges, paraphrases the original or tentative interpretation by the Market Administrator. The detailed facts relating to the various claims are set forth in the Argument *infra*. Both the District Court and the

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[5] The Judicial Officer acted for the Secretary of Agriculture of the United States pursuant to the authority delegated (10 F.R. 13769) under the Act of April 4, 1940, 54 Stat. 81, 5 U.S.C. 516a *et seq.*, which provides (Sec. 3) that whenever a delegation is made under the statute, "all provisions of law shall be construed as if the regulatory function or the part thereof delegated had (to the extent of the delegation) been vested by law in the individual to whom the delegation is made, instead of in the Secretary of Agriculture."

Court of Appeals (in an opinion by Chief Judge Learned Hand) affirmed the ruling of the Judicial Officer denying the petitioner's claims. They held that the handling transactions do not comply with the III-D classification in the order; that the original interpretation was inconsistent with the terms of the order and therefore erroneous; and that since the stipulation set forth an erroneous legal conclusion, it was not binding on the courts in this respect.

ARGUMENT

The controversy here centers on the question—the importance of which does not extend beyond this case—whether the petitioner's handling transactions in cream were within Class III-D. All milk received from producers is classified in accordance with its utilization at, or movement from, the plant where it is received from producers, subject to two exceptions to which the petitioner's claims relate: (1) if milk is moved as milk from any plant outside the marketing area where it was received from producers to a second plant outside the marketing area, the classification of such milk at the first plant may be in accordance with its utilization at the second plant; and (2) if milk is moved as cream from any plant outside the marketing area to any second plant, the classification of such milk at the first plant may be in accordance with its utilization at the second plant. On the basis of these exceptions, the petitioner contends that the handling transactions in cream, included

in its claims, should be classified as III-D. That classification includes any transaction in which there was (1) a sale and delivery of cream to a purchaser, (2) the purchaser was "not a handler," and (3) the delivery of the cream was "outside the State of New York and outside any county in other States in which there is a plant which is approved by any health authority for the receiving of milk to be sold in the marketing area."

The tentative interpretation, relied on by the petitioner, and the part of the stipulation between the parties, discussed below, which set forth an erroneous legal conclusion relate only to one of the criteria for III-D classification, i.e., the requirement that the cream be delivered to a purchaser who is "not a handler." In denying petitioner's claims, the lower courts applied settled principles of statutory construction and judicial review, and the rulings below seem plainly correct. Moreover, as pointed out below, the handling transactions in the petitioner's claims do not comply with another essential element for that classification. The petition therefore presents no question which warrants further review by this Court.

I

The various handling transactions for which Class III-D is claimed by the petitioner are in five groups, characterized by the petitioner as Claims 1, 2, and (A), (B), and (C) under Claims 3 and 4.

The lower courts denied Claim No. 1 because the cream was delivered to a plant in a county in which there was a plant approved by the health authorities for receiving milk to be sold in the marketing area.[6] The classification plan is on the basis of plant movement rather than ultimate utilization (*Queensboro Farm Products, Inc.* v. *Wickard* 137 F. 2d 969 (C.A. 2), and *Waddington Milk Co.* v. *Wickard,* 140 F. 2d 97 (C.A. 2), and as the opinion of the court below observes (R. 187):

> All we need hold as to Claim One is that when a "purchaser" receives cream in an "unapproved county" and takes it at once to a "plant" in an "approved county," his status as "handler" of that milk is to be determined by the location of that "plant."

The tentative interpretation by the Market Administrator as to the meaning of the phrase "not

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[6] Alternative grounds were considered. E.g., because the appellate court considered the question "a vexing one," the petitioner's argument was accepted, for the purposes of the appeal (R. 185-186), that "utilization" at the second plant, under the exceptions in Article III, section 1 of the order (R. 85-86; and Appendix, *infra*, p. 21) has a meaning as broad as the general rule of classification on the basis of "utilization at, or movement from, the plant" at which the milk was received from producers. If the petitioner's argument in this respect is rejected, the only basis for the III-D classification at the second plant, under the definition of Class III-D (R. 87; and Appendix, *infra*, p. 22), would be in the event the cream is there manufactured into cream cheese. The graphic charts (R. 196-199) that are appended to the opinion of the Court of Appeals are useful in tracing the shipments through the various plants. After considering the claim on the hypotheses urged by the petitioner, it was decided that the claim is without merit under the III-D requirements.

a handler" in the definition of Class III-D is not, therefore, the basis for disposition of this claim with respect to cream which the petitioner sold, under the terms of its agreement, "subject to reclassification by the Market Administrator" (R. 47). Also the erroneous legal conclusion in the stipulation refers only to Claim No. 2 and (A) under Claims 3 and 4.

II

The petitioner's Claim No. 2 is with respect to cream which the petitioner shipped from its plants in Horseheads, New York, and Mansfield, Pennsylvania, to the petitioner's plant in Newark, New Jersey (R. 68). The shipment of the cream was by the petitioner to the petitioner. There was not, therefore, a sale and delivery of the cream to a "purchaser," as required for classification in Class III-D.

Assuming, *arguendo,* a sale and delivery of the cream to a purchaser, the question arises as to whether the purchaser was a handler.[7] It is admitted (R. 62) that the petitioner was a handler, and operated as a handler during all of the periods involved in this case. It was as a handler that this proceeding was instituted, under the statute, by the petitioner. Compare *Stark* v. *Wickard,* 321

[7] This is either on the basis that the shipment by the petitioner to the petitioner was a delivery to a purchaser or on the petitioner's hypothesis that classification may be had on the basis of "movement from" the second plant under the exception in Article III, section 1 of the order, *infra,* p. 21.

U.S. 288, with *United States* v. *Ruzicka,* 329 U.S. 287. But the stipulation erroneously stated (R. 68), with respect to Claim No. 2, that this delivery of cream by the petitioner to the petitioner "was not a receipt or purchase by a handler." The shipment by the petitioner to the petitioner involved no delivery to a purchaser at all, but the petitioner's contention is that this part of the stipulation states or connotes that the delivery was to a non-handler, and is alleged to be merely a restatement of an interpretation (R. 131) by the Market Administrator that the phrase "not a handler," in the definition of Class III-D, means that when "a plant is not approved for the marketing area the dealer is not considered a handler at that plant," even though the dealer may have other approved plants. The petitioner's plant to which the cream was shipped by the petitioner was not approved for receiving milk to be sold in the marketing area, and the County had no approved plant. By definition in the order (R. 83; 7 CFR, 1938 Supp., 927.2(f)) a handler is any person who engages in the handling of milk or cream "which was received at a plant approved by any health authority for the receiving of milk to be sold in the marketing area * * *."

To be entitled to III-D classification the cream must be delivered to a purchaser in a county (outside of New York) *without* a plant approved by the health authorities for the receiving of milk to be sold in the marketing area, and at the same time

the purchaser must *not* be a handler. If the definition of Class III-D means only that the purchaser should not be a handler with respect to the plant to which the cream is delivered, the words "not a handler" are meaningless and redundant, because if delivery is made outside of a county having an approved plant, the purchaser could never be a handler as to such delivery since he would not be operating an approved plant in the county in which the delivery is made.[8] An interpretation or construction is not favored which renders meaningless or redundant a provision in the order. *Singer* v. *United States,* 323 U. S. 338; *McDonald* v. *Thompson,* 305 U. S. 263, rehearing denied, 305 U. S. 676; *Ginsberg & Sons* v. *Popkin,* 285 U. S. 204, and *Irving Trust Co.* v. *Maryland Casualty Company,* 83 F. 2d 168 (C.A. 2), certiorari denied, 299 U. S. 571.

The delivery of cream, in order to warrant the III-D classification, must always be to a purchaser who is not a handler at the plant where the delivery is made because, if the plant is approved by the health authorities for the receiving of milk to be sold in the marketing area, such approval results in the county, in which the plant is located, having an approved plant; and the III-D classification cannot be had on a delivery to a purchaser in a

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[8] See definition of "handler" in the New York Marketing order (R. 83).

county having an approved plant. It was, therefore, to achieve a definite result that the words "not a handler" were included in the Class III-D definition. These words have meaning and significance only if given the obvious meaning that if a purchaser qualifies under the order as a handler by reason of its operations *at any plant*, the cream delivered to such purchaser cannot qualify for Class III-D, on the basis of delivery to a purchaser, even if the cream is delivered to a plant which is not approved by the health authorities and at which the purchaser is not, therefore, a handler. Moreover, the giving of significance and meaning to the phrase "not a handler" is in accord with the basic purpose (R. 140) of giving the III-D classification only to cream sold and delivered to a non-handler for use in the outside markets beyond the supply source for the New York marketing area. Certainly this classification is not to be given to a handler who merely transfers the cream from one of his plants to another of his plants.

The first or tentative interpretation (R. 131) by the Market Administrator as to the meaning of the phrase "not a handler" was issued in December 1938. There is no basis in the record for the petitioner's assertion that the Secretary approved that interpretation of the Market Administrator or that any other official of the United States Department of Agriculture authorized to bind the Secretary

ever approved the interpretation.[8a] The powers and duties of the Market Administrator are specified in the order (R. 84; 7 CFR, 1938 Supp., 927.3), but the order does not authorize the Market Administrator to issue interpretations. The statute provides (7 U. S. C. 608c(7)(C)(ii)) that the Secretary may delegate authority to the Market Administrator to issue rules and regulations, but the order in effect during the period of these handling transactions does not contain that authorization. The Market Administrator is merely to administer the order in accordance with its terms and conditions. It was held in *Queensboro Farm Products* v. *Wickard,* 137 F. 2d 969, 981-982 (C.A. 2), footnote 21, that the Market Administrator is without power to bind the Secretary by the issuance of an interpretation. Acts of a governmental officer in excess of the authority conferred upon him do not bind or estop his superior officers or the United States. *Federal Crop Insurance Corporation* v. *Merrill,* 332 U. S. 380, 383-384; *United States* v. *Stewart,* 311 U. S. 60, 70; *United States* v. *San Francisco,* 310 U. S. 16, 32.

[8a] The only instances in which some other person—and that person had no authority to bind the Secretary—in the United States Department of Agriculture concurred in or approved statements by the Market Administrator were with respect to matters which are not relevant interpretations at all (R. 53-55, and 77) in dealing with the meaning of the phrase "not a handler" in the definition of Class III-D, and it is the interpretation (R. 131) which was paraphrased in the stipulation—on which the petitioner now relies—that has relevance to the meaning of the phrase "not a handler" in the definition of Class III-D.

The interpretation relied on by the petitioner is tantamount to an amendment to the order, and the Market Administrator could not have been empowered to make any such change in the regulatory provisions of the order. The power to amend the order is vested only in the Secretary (7 U. S. C. 608c(17)), and even the Secretary cannot amend the order by merely issuing an interpretation. The amendment to the order must be based on substantial evidence adduced at a public hearing, and the amendment must be approved by at least two-thirds of the producers. The Market Administrator was without authority, and could not have been vested with authority, to issue the interpretation on which the petitioner now relies.

The part of the stipulation, with respect to the shipment of cream by the petitioner to the petitioner, which states that the cream, in this claim, was not delivered to a handler within the meaning of the phrase "not a handler" in the definition of Class III-D, even though the petitioner was a handler at other plants at the time of the delivery of the cream, is not a stipulation of evidentiary facts but a stipulation as to a legal conclusion. The stipulation is not, therefore, binding on the courts. *Swift & Co.* v. *Hocking Valley Ry. Co.*, 243 U. S. 281; *Estate of Sanford* v. *Commissioner*, 308 U. S. 39, 41; and *Cloverleaf Dairy Co.* v. *Patterson*, 315 U. S. 148, 151-152. The stipulation embodying the erroneous interpretation by the Market

Administrator attempted, as the court below said (R. 192-193) "to put a gloss upon the Regulation, and the Regulation had the force of law;" and it is the duty of courts "to administer rights and obligations as they exist, not as the parties may choose to substitute others." If petitioner believed that the Judicial Officer acted improperly in his ruling on the stipulation (Pet. 15-16, Br. 28-29), it should have brought this to his attention, by a petition to rehear, reargue, or reconsider his ruling. 7 CFR, 1943 Cum. Supp., 900.68(a)(3).

The petitioner did not conduct its business in reliance on the stipulation or the interpretation. The stipulation was executed in January 1944, and the claims by the petitioner are for the period ending on April 30, 1940. The interpretation by the Market Administrator was issued in December 1938 but on October 20, 1939, the Market Administrator reclassified (R. 63-64) the cream shipments of the petitioner for certain prior months, and demanded payment of $48,575.78, which was paid under protest by the petitioner and for the recovery of which, along with certain other payments, this proceeding was instituted by the petitioner.[9] Subsequently the Market Administrator made other reclassifications for the period ending on April 30,

[9] The order was in suspension (4 F.R. 1259, 2377) during the period January 31, 1939, to July 1, 1939. The tentative interpretation in December 1938—reversed in October 1939—never "seasoned or broadened into a settled administrative practice." *Davies Warehouse Company* v. *Bowles*, 321 U. S. 144, 156.

1940. The petitioner's method of doing business was determined long before the tentative interpretation was issued by the Market Administrator, and was continued long after the interpretation was expressly reversed by the Market Administrator and even after the petitioner filed (R. 12) its petition under section 8c(15)(A) of the statute. The Market Administrator—not a subordinate, as asserted in the petition for certiorari (p. 15)—reclassified the cream (R. 63-64), and the petitioner paid the money under protest to the Market Administrator (R. 63-64), and not to a subordinate. The order (R. 102) directs the Market Administrator to verify reports and payments by handlers, and to make such reclassifications as will result in computations in accordance with the classification and pricing provisions in the order.

Assuming, *arguendo,* that classification can be had on the basis of "movement from" the second cream plant, as distinguished from mere "utilization" in that plant, the record shows (R. 62-63, 68-72) that the cream in this claim was not delivered from the second plant to a nonhandler purchaser in a county, outside of the State of New York, having no plant approved for receiving milk to be sold in the marketing area. There is therefore no merit in the petitioner's claim for the III-D classification.[10]

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[10] The graphic charts appended to the opinion (R. 196-199) of the Court of Appeals are useful in tracing the various shipments.

III

The interpretation of the Market Administrator and the erroneous legal conclusion in the stipulation are further involved only in (A) under Claims 3 and 4. In this claim the petitioner's milk was delivered to the plant of the Borden Company in Belmont, New York, and was there separated into cream which was shipped to the Borden plant in Newark, New Jersey, and from that "second plant" it was again shipped to another Borden plant in New Jersey (R. 72). Prior to October 1, 1939, when the Newark plant was operated as a Division of the Borden Company, the shipment by the Borden Company to the Borden Company did not constitute a delivery to a purchaser and therefore the cream could not be in Class III-D, even assuming the validity of the interpretation and the stipulation as to the meaning of the phrase "not a handler."

From October 1, 1939, to April 30, 1940, the end of the period involved in this case, the Newark plant was operated by Borden's Farm Products of New Jersey, Inc. (R. 72, 125-126). Since this company received milk from "producers" (R. 73), it was a "handler" (R. 83) and the III-D classification cannot be had because the company, even if considered to be a purchaser, was a handler.

IV

The cream involved in (B) and (C) under Claims 3 and 4 was not delivered to a purchaser,

outside the State of New York, in a county having no plant approved for receiving milk to be sold in the marketing area (R. 75-76). This is so irrespective of whether classification is on the basis of utilization at the second plant or on the basis of movement from the second plant, as contended for by the petitioner. There is, therefore, no necessity for dealing with the interpretation of the phrase "not a handler" in disposing of these claims. No part of the stipulation applicable to these claims was rejected by the courts.

V

Petitioner asserts that there is a conflict between the decision in this case and the decision in *Barron Co-op. Creamery* v. *Wickard*, 140 F. 2d 485, 488 (C.A. 7).[11] Petitioner quotes from the opinion in that case, which involved the Chicago milk marketing order, to the effect that nothing in the Chicago order "required the handler to look beyond his own disposition of the milk" or to "pursue the milk and milk products to see in what use classification they were ultimately disposed of." But the Chicago order (see 140 F. 2d 485, at page 488) did not provide for classification on the basis of utilization at, or movement from, the plant where

[11] The petitioner asserts (Pet. 17) that the decision of the court below is in conflict with several other cases, but no showing of any conflict is made. The cases cited by the petitioner (Br. pp. 25-28; 32-33) deal with issues and legislation totally different in language and purpose from that here involved.

the milk was received from producers, subject to certain exceptions for classification on the basis of utilization at the second plant. The basis of classification under the Chicago milk order is therefore quite different from that of the New York milk order here involved and there clearly is no conflict between the *Barron* decision and that of the court below. Petitioner seeks—instead of denies—the privilege of classification on the basis of utilization at the second plant.

CONCLUSION

The decision of the court below is correct and there is no conflict with the decision of any other court of appeals. It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

PHILIP B. PERLMAN,
Solicitor General.
J. STEPHEN DOYLE, JR.,
NEIL BROOKS,
Special Assistants to the Attorney General.
LEWIS A. SIGLER,
Assistant Associate Solicitor,
U. S. Department of Agriculture.

AUGUST, 1949

APPENDIX

Aricle III of Order No. 27 (7 CFR, 1938 Supp., 927.4), in effect during the time with respect to the handling transactions involved in this case, provides:

"Section 1. *Basis of Classification.* All milk received from producers by handlers shall be classified in the classes set forth in section 2 of this article in accordance with its utilization at, or movement from, the plant where received from producers, including members of any cooperative association: *Provided,* That if milk is moved as milk from any plant outside the marketing area where received from producers to a second plant outside the marketing area, classification of such milk at the first plant may be in accordance with its utilization at such second plant: *and provided further,* That if milk is moved as cream, plain condensed milk or homogenized mixtures from any plant outside the marketing area to any second plant, classification of such milk at the first plant may be in accordance with its utilization at such second plant.

"Any utilization of milk claimed by a handler shall be subject to verification by the market administrator. Any claim by a handler of utilization of milk at the plant of any other person shall be accompanied by a complete statement of such utilization and written consent by such person for the market administrator to verify such statement by an audit of such person's records.

* * * * *

"Section 2. *Classes of Utilization.* The classes of utilization of milk shall be as follows:

* * * * *

"2. Class II-A milk shall be all milk the butterfat from which leaves or is on hand at a plant in the form of cream, except as set forth in paragraphs (5) and (7) of this section:

* * * * *

"7. Class III-D milk shall be all milk the butterfat from which is delivered as cream to a purchaser, not a handler, outside the State of New York and outside any county in other States in which there is a plant which is approved by any health authority for the receiving of milk to be sold in the marketing area, also milk the butterfat from which leaves or is on hand at a plant in the form of cream cheese."

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1949

No. 202

DAIRYMEN'S LEAGUE CO-OPERATIVE ASSOCIATION, INC.,
Petitioner,

v.

CHARLES F. BRANNAN, Secretary of Agriculture
of the United States.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITIONER'S REPLY BRIEF

SEWARD A. MILLER,
Attorney for Petitioner.

FREDERIC P. LEE,
MYRON SCOTT,
Of Counsel.

In the

Supreme Court of the United States

October Term, 1949

No. 202

Dairymen's League Co-operative Association, Inc.,

Petitioner,

v.

Charles F. Brannan, Secretary of Agriculture of the United States.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

PETITIONER'S REPLY BRIEF

In general, respondent's answering brief does not meet the grounds advanced in the petition for certiorari. Instead it sets up straw men, supported by misstatements of fact which require a reply.

The argument that the interpretations and stipulation complained of concern only one of the essential elements of classification is met by the petition which shows that there were three principal questions relating to classification determined by the interpretations and incorporated in the stipulation. The argument that the controversy presented does not go beyond the case refers only to respondent's own straw men and does not mention the prin-

cipal questions presented by the petition. As to these questions respondent's brief is silent, particularly as to the questions of Administrative Law and practice involved as to the effect of the interpretations and the stipulation.

Erroneous statements in the respondent's brief are highly important in this case. The principal ones are, in substance, that the interpretations of the Market Administrator here involved were tentative and were reversed by him (p. 2, lines 16-18; p. 6, lines 12-16; p. 16, footnote; and p. 17, lines 1-12 of respondent's brief). Not only is the record bare of support to such statements but as a matter of fact they are contrary to the actual facts, as is clearly shown by the affidavit of E. M. Harmon, the then Market Administrator, annexed hereto in the Appendix, p. 1.

As a matter of fact, as shown by the affidavit and petitioner's original brief, there were three interpretations, *viz.*, (a) that a handler receiving cream at an unapproved plant was not a handler with respect to that plant; (b) that cream shipped to an unapproved county automatically took a III-D classification; and (c) that classification might be in accordance with utilization in the second cream plant which might be the third plant.

Petitioner had no knowledge of any attempted modification as to any of these interpretations prior to the conclusion of the operations here involved except that petitioner of course did know of the reclassifications and demand for payment on account of such reclassifications.

The interpretation as to who is a handler was first and merely mentioned in the review proceeding by the Judicial Officer and the reversal of the interpretation was by the Court of Appeals.

A second important erroneous statement is contained in the footnote on page 14 of respondent's brief, in substance, that the only instance in which others beside the Market Administrator approved of the interpretation was in case

of interpretations (b) and (c). An examination of the record shows clearly that the three interpretations were issued practically simultaneously and as a result of the conference between representatives of the industry, the Market Administrator and representatives of the Secretary of Agriculture at Washington and of the Department of Agriculture and Markets of New York (R. 53, 129, 130 and 131). Thus Finding No. 9 shows clearly that all three interpretations were involved in the conferences of November 26, 1938 and issuance of interpretation on December 5, 1938. There is also an error in the statement that the "handler" interpretation only involved two of the five claims of petitioner. As a matter of fact it involved all but the first.

Respondent claims that the bill dated October 20, 1939, stating amounts due from petitioner by reason of the reclassification by the office of the Market Administrator was in effect a notice of rescission of the interpretations of December 1938 (Respondent's brief, p. 16, line 18; p. 17, line 12). The notice actually covered audits of the entire operations of the petitioner and its buying dealers under the order averaging in excess of two and a half million dollars per month and of III-D sales in excess of $125,000 per month and, as clearly shown by a copy of such notice set forth in the Appendix, p. 3. No details or explanations were given by the notice sufficient to indicate any such rescissions.

Respondent also erroneously claims that petitioner did not conduct its business in reliance upon the interpretations (p. 16, lines 12-13) and that its business methods were adopted long before such interpretations and continued after the Fall of 1939 (p. 17, lines 1-3).

The Judicial Officer held that there was such reliance (R. 144, 145) and the evidence is clear that the cream sales under Claim I were stopped in November 1939 and an

entirely new method of sales of Janssen Dairy Company then adopted.

In any event, the real point in issue is whether the sales of cream in question were made in accordance with the interpretations as publicly and officially announced by the Market Administrator and whether those interpretations are to be treated as the law governing the transactions.

Respectfully submitted,

SEWARD A. MILLER,
Attorney for Petitioner.

FREDERIC P. LEE,
MYRON SCOTT,
Of Counsel.

APPENDIX

Affidavit

State of New York }
County of New York } ss.:

E. M. Harmon, Eastern Regional Representative of National Dairy Council, 437 Fifth Avenue, New York 16, N. Y., being duly sworn, deposes and says that he was the Administrator with the title of "Market Administrator" appointed by the Secretary of Agriculture as such under the New York Metropolitan Milk Marketing Order, known as Order No. 27, from September 1, 1938 to sometime in May, 1940. In December, 1938, pursuant to requests for rulings from the industry and following industry meetings and conferences held in November and December, 1938, with respect thereto, at which Mr. E. W. Gaumnitz, Chief of the Dairy Section of the Department of Agriculture at Washington, and Mr. Kenneth Fee, Director of Milk Control of the Department of Agriculture and Markets of the State of New York, were present, deponent was authorized by such federal and state officials to issue to the industry the following interpretations with respect to the classification provisions of Order No. 27: (a) that a handler receiving cream at an unapproved plant was not a handler with respect to that plant; (b) that cream shipped to an unapproved county automatically took a III-D classification; (c) that classification might be in accordance with utilization in the second cream plant which may be the third plant.

Deponent never reversed, changed or altered these interpretations. A difference of opinion, however, arose among the members of the staff of deponent's office as to (b) above, as to whether cream could remain under III-D classification if after delivery in an unapproved county it

passed directly into an approved county. Because of such differences of opinion, while deponent did not alter his position as to any of the three interpretations above and is still of the opinion that they are correct, some of the cream was re-classified from III-D to II-A (unpriced) because it was moved from its first delivery point in an unapproved county to an approved county for distribution. This was done in the expectation and desire that the League would seek a review of the reclassification and thus there would be a determination of the issue of whether interpretation (b) needed amplification in case of further movement to an unapproved county for distribution. Deponent agreed to the reclassifications being made for that purpose only. The contrary instructions of an auditor on the deponent's staff, Mr. Aldrich, expressed in a memorandum dated February 14, 1940, were not directed to be made by the deponent, were not approved by deponent and, to the very best of deponent's recollection, were never brought to deponent's attention.

E. M. Harmon.

Sworn to before me this
13th day of September, 1949.

Gerald G. Hogan,
Notary Public, State of New York.
No. 60-1826875.
Qualified in Westchester County.
Cert. filed with N. Y. Co. Clk & Reg.
Commission expires March 30, 1951.

Appendix.

COPY

MARKET ADMINISTRATOR
NEW YORK METROPOLITAN MARKETING AREA
95 Madison Avenue
New York, N. Y.

United States Secretary of Agriculture Order No. 27

COMMISSIONER OF AGRICULTURE and MARKET: of the State of New York Order No. 126

Date 10/20 1939

To: DAIRYMEN'S LEAGUE COOPERATIVE ASSOCIATION, INC.
11 West 42nd St.
New York City

PRODUCER SETTLEMENT FUND
Pool Debit Account
Under
Above Orders Article VII
Section 8 and 10

Date	NET POOL OBLIGATION Quantity Whole Milk Pounds	Amount	Published Uniform Price Value*	Debits	Credits	Balance
10-20	AUDIT ADJ. OF SEPT. REPORT 443,837	$ 7,460.21	$ 8,299.75	$ 839.54	Not Disputed	
10-20	AUDIT ADJ. OF OCTOBER REPORT 190,890	4,652.30	3,646.00	1,006.30	Disputed	
10-20	AUDIT ADJ. OF NOVEMBER REPORT 1,291,520	10,724.89	27,121.92	16,397.03	(Item #1)	
10-20	AUDIT ADJ. OF DECEMBER REPORT 1,420,270	11,738.26	28,689.45	16,951.19	Disputed (Item #2)	
10-20	AUDIT ADJ. OF JANUARY REPORT 1,235,990	9,854.89	23,236.61	13,381.72	Disputed (Item #3)	$48,575.78
	Also affects the assessment (2¢ per C)				Disputed	1,283.93
	" " " "					2,100.36

*Published Uniform Price Per Cwt.
for Pool Period Ending ..... is $.....

NOTE: If the last figure in the Balance Column is a CREDIT please acknowledge Receipt of our check on form below. If a DEBIT please complete and attach this form to your remittance.

Date 19
Handler .....
By .....
(Signature) (Title)

Amount Due to Fund $48,575.78
Check No. .....
Pool Period Ending .....
By .....
(Chief Accountant)

MARKET ADMINISTRATOR—NEW YORK METROPOLITAN MILK MARKETING AREA
95 Madison Avenue New York, N. Y.